

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of

Amendment of the  
Commission's Rules Regarding  
Multiple Address Systems

)  
)  
) WT Docket No. 97-81  
)

TO: The Commission

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Federal Communications Commission  
Office of Secretary

**COMMENTS OF THE**  
**ALARM INDUSTRY COMMUNICATIONS COMMITTEE**

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## SUMMARY

The Alarm Industry Communications Committee ("AICC") represents a membership which fulfills a fundamental spectrum use goal articulated by the Communications Act of 1934, as amended ("the Act"). These companies and associations are dedicated to "promoting the safety of life and property through the use of wire and radio communications." Section 1 of the Act, 47 U.S.C. § 151.

AICC recommends that the Commission should process all pending applications for Multiple Address Systems ("MAS") spectrum by lottery. The Commission should recognize that the adoption of an auction scheme for MAS in the Fixed Microwave Services is inconsistent with the Commission's auction authority, and is adverse to the public interest. In particular, AICC recommends that the Commission recognize that MAS applications filed prior to the passage of the auction legislation are entitled to processing. Congress granted the Commission the authority to continue granting certain applications to lottery. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI. § 6002(e) (1993) ("OBRA"). The MAS applications filed prior to the passage of OBRA are among the applications "accepted for filing by the Commission before July 26, 1993," for which lotteries may be used. See § 6002(e)(2) of OBRA. The Commission must examine the Congressionally mandated public interest considerations which compel the Commission to award these MAS licenses for lottery. § 6002(a) of OBRA.

The public interest in MAS spectrum is best served by awarding MAS licenses by lottery. First, A lottery is the best method to ensure the realization of the goal of promoting economic opportunities for small business contained in Sections 309(j)(3)(B) and (j)(4)(C)(ii) of the Act, because only in a lottery will small businesses be placed on an equal footing with larger firms to have an opportunity to win a license. Second, A lottery for MAS licenses will promote an equitable distribution of licenses and services among a wide number of geographic

areas and applicants. See Section 309(j)(4)(C)(i); also see Section 309(j)(3)(B). The Commission has recently licensed several new mobile services in addition to cellular, and in light of the limited spectrum available for fixed microwave services, it is not in the public interest to expand the use of MAS frequencies beyond point-to-multipoint microwave use. Third, the Commission's proposal to define a service area based on the U.S. Department of Commerce's Economic Areas ("EAs") will undermine the public interest objective in the rapid deployment of services to rural areas, particularly when combined with the Commission's proposal for liberal construction and coverage requirements for geographic licenses. See Section 309(J)(4)(C)(iii); also see Section 309(J)(3)(A). Finally, even if it were assumed arguendo that the newly adopted auction scheme could be applied retroactively to existing mutually exclusive applications, the Act does not authorize dismissal of these applications. See Section 309(j)(1).

AICC recommends that the Commission find that auctions for MAS licenses are adverse to the public interest. AICC respectfully submits that any additional time needed for a lottery is, in the big picture, a small price to pay for the fair treatment of the existing applicants, and the public interest benefit of preserving MAS as a fixed service available to small businesses. Moreover, any licensing delay will be compensated by the shorter buildout period under the lottery scheme. Additionally, the Commission should recognize that the past safeguards employed to prevent undue market concentration, spectrum warehousing, and to promote economic opportunity, have been resoundingly insufficient. Finally, although an auction may result in greater recovery of the value of MAS spectrum than would result from a lottery, the Commission should find that the aforementioned public interest considerations ultimately support the award of MAS licenses by lottery.

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**COMMENTS OF THE  
ALARM INDUSTRY COMMUNICATIONS COMMITTEE**

The Alarm Industry Communications Committee ("AICC") hereby submits its Comments in response to the Commission's Notice of Proposed Rule Making ("NPRM") in the captioned proceeding, released February 27, 1997. As discussed below, the adoption of an auction scheme for Multiple Address Systems ("MAS") in the Fixed Microwave Services is inconsistent with the Commission's auction authority, and is adverse to the public interest.

**I. Statement Of Interest**

AICC is a committee formed by the Central Station Alarm Association ("CSAA"). AICC represents the vast majority of entities providing central station alarm security protection. AICC members fulfill a fundamental spectrum use goal articulated by the Communications Act of 1934, as amended ("the Act"). These companies and associations are dedicated solely to "promoting the safety of life and property through the use of wire and radio communications." Section 1 of the Act, 47 U.S.C. § 151. Although not allocated Public Safety Radio Service frequencies, central station alarm services frequently act as the "front line" in dispatching municipal police and fire units, whose radio operations are part of the Public Safety Radio Service. Alarm devices placed in predetermined locations sense fire, intruders or other threats to persons and property, and instantly transmit this data to a central station that is monitored by personnel trained in handling such matters. The central station personnel in turn alert the dispatch office of municipal authorities, usually police or fire departments. A central station alarm office also may dispatch mobile units of a private security force. Thus, mobile voice,

and fixed signaling transmissions work in tandem in "promoting the safety of life and property."

AICC members often use MAS spectrum in protecting their customers. Usually, the MAS system is employed in a point-to-multipoint configuration, with the primary station "polling" several high-priority alarmed buildings regularly. The return link from each building reports the status of the alarm system, and relays the alarm signal itself in the event of a break in, fire, or other emergency. Because of this valuable use for MAS channels, several alarm companies applied to participate in the MAS lottery announced by the Commission in 1991. In general, these companies have a specific site in mind for the MAS system, and do not seek to use the spectrum over an entire Major Trading Area, Basic Trading Area, Economic Area, or other large geographic subdivision. Therefore, these entities are relying on the processing and grant of the site-specific applications they have filed.

## **II. The Commission Should Process All Pending Applications By Lottery.**

In the NPRM, the Commission has tentatively concluded that the public interest would be best served by using competitive bidding to award licenses in the 932/941 MHz bands. The Commission therefore proposes to dismiss without prejudice the license applications submitted in 1992 for the 932/941 MHz bands. It is respectfully submitted that dismissal of the applications would be improper, and would be adverse to the public interest by depriving small businesses of licensing opportunities, and creating further administrative delay.

### **A. Applications Filed Prior To The Passage Of The Auction Legislation Are Entitled To Processing.**

The Commission has noted that since 1992 it has held over 50,000 applications for MAS licenses in the 932/941 MHz bands filed pursuant to filing windows of January-February 1992. In 1991, the Commission issued a Public Notice, DA 91-1422, 6 FCC Rcd 7242 (released November 27, 1991), in which the Commission announced it would process mutually exclusive applications for MAS licenses by a lottery. Applications were filed in early 1992 for licenses

on the allocated channels. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI. § 6002(a) (1993) ("OBRA") added Section 309(j) to the Act, by which Congress intended to authorize the Commission, for certain classes of radio licenses, to employ competitive bidding rules to choose among mutually exclusive applications for initial licenses.

Under well settled principles of administrative law, administrative agencies generally do not possess the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. See e.g. Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) (Retroactivity is not favored in law; statutory grant of rulemaking power generally requires express terms by Congress); Yakima Valley Cablevision v. FCC, 794 F.2d 737, 745 (D.C. Circuit 1986) ("Courts have long hesitated to permit retroactive rulemaking and noted its troubling nature.") Within Section 309(j), Congress did not expressly authorize the Commission to apply competitive bidding rules retroactively. The only indication in OBRA that Congress intended to allow the Commission to apply auction rules retroactively is in the "Special Rule" of § 6002(e) of OBRA. Significantly, under the "Special Rule" of OBRA, however, Congress also granted the Commission the authority to continue granting certain applications to lottery. The MAS applications filed prior to the passage of OBRA are among the applications "accepted for filing by the Commission before July 26, 1993," for which lotteries may be used. See § 6002(e)(2) of OBRA. All the applications were properly submitted to the Commission, at substantial expense, in response to the Commission's invitation to file. The Commission accepted the filing fees, and assigned file numbers to the applications. The Commission has required subsequent amendments to the applications when necessary to reflect ownership and other changes, and has instructed applicants to reference the assigned file number when amending their applications. Therefore, the applications must be deemed accepted for filing. The fact that the Commission failed to adhere to its own rules, which require the Commission to issue an "accepted for filing" Public Notice at regular intervals, does not change

this analysis. See 47 C.F.R. § 1.962 (1992). Given the fact that these applications were filed and accepted before July 26, 1993, the Commission must examine the Congressionally mandated public interest considerations which compel the Commission to award these MAS licenses for lottery.

Under the directives of OBRA, Congress has clearly directed the Commission to promote economic opportunity by ensuring that new and innovative technologies, such as MAS, are accessible to the public by disseminating licenses to small businesses. See Section 309(j)(3)(B) of the Act. Congress also mandated that the Commission shall promote economic opportunity for small businesses. See Section 309(j)(4)(C)(ii) of the Act. A lottery is the best method to ensure the realization of this public interest objective, because only in a lottery will small businesses be placed on an equal footing with larger firms to have an opportunity to win a license. If the Commission processes the site-specific applications it has already received, thousands of systems will be licensed, and many of them will be in the hands of small businesses. In contrast, the Commission's auction proposal would fundamentally change the nature of MAS, by creating larger service areas and allowing mobile services in this spectrum. There is a great danger that MAS will thereby become a "PCS wanna be." The larger service areas will attract large, well financed carriers who may not have obtained as much Commercial Mobile Radio Service spectrum as desired from prior auctions. It will be extremely difficult for small businesses to compete against such bidders, especially if these small businesses are forced to bid on a larger market area than they planned to serve. Alarm companies in particular will have a much more difficult time obtaining MAS licenses for specific high priority alarm systems requiring this spectrum.

Congress has also required the Commission to promote an equitable distribution of licenses and services among a wide number of geographic areas and applicants. See Section 309(j)(4)(C)(i); also see Section 309(j)(3)(B). The frequencies available for MAS have been traditionally dedicated for point-to-multipoint microwave use. The Commission proposes to



fundamentally alter the nature of MAS counter to the public interest in the utilization of this spectrum. The Commission proposes to allow MAS geographic area licenses to utilize both point-to-point and point-to-multipoint operations and to provide fixed and mobile service on a co-primary basis, over a large geographic area. According to the Commission, this expansion of the use of MAS spectrum is necessary in order for firms to effectively compete in today's communications marketplace. It is not in the public interest to expand the use of MAS frequencies beyond point-to-multipoint microwave use. The public interest is better served by maintaining the reservation of MAS channels for point-to-multipoint use.

In light of the limited spectrum available for fixed microwave services, MAS spectrum should remain allocated exclusively for point-to-multipoint use, in order to preserve the viability of services, such as those represented by AICC, which provide very important public safety functions. As discussed above, AICC members often use MAS spectrum in protecting their customers. These channels are used to carry alarm signals in the event of a break in or fire.

The Commission must also consider that the public interest is not solely driven by the needs of large firms to compete in the provision of communications services, in particular the provision of mobile services. The Commission has recently licensed several new mobile services in addition to cellular, such as narrow and broadband Personal Communications Service ("PCS"), as well as Wide Area Specialized Mobile Radio ("SMR") service. The pool of available microwave spectrum for fixed services has already been depleted through the reallocation of spectrum to the "emergency technologies" band in ET Docket No 92-100. The public interest in adding another mobile service, and further depleting fixed service spectrum, is negligible. Indeed, the Commission has already found that MAS frequencies were "not suitable for providing a communications service to a large sector of the general public, such as the channels the Commission has allocated for cellular, paging, or specialized mobile radio (SMR) services." Public Notice, 6 FCC Rcd at 7243. As the Commission has the statutory authority to utilize lotteries, which will serve the public interest, MAS spectrum should be

limited to point-to-multipoint use on a site-specific basis, and should be licensed by lottery consistent with the public interest objectives mandated by Congress.

Additionally, Congress has mandated that the Commission promote the rapid deployment of services to rural areas. See Section 309(J)(4)(C)(iii); also see Section 309(J)(3)(A). The Commission's proposal to define a service area based on the U.S. Department of Commerce's Economic Areas ("EAs") will undermine this public interest objective, particularly when combined with the Commission's proposal for liberal construction and coverage requirements for geographic licenses. The Commission's proposal provides a low coverage threshold (15 percent of the population) and far greater time to achieve this coverage (five years). It is likely that there will be virtually no incentive for winners of licenses to serve the rural areas, which present far higher costs and lower potential profits. It is almost certain that at least fifteen percent of the population in each market area resides in the city limits of the major city of town that is located therein. This policy will allow a service provider to retain its license by serving the urban areas of a service area, while declining to extend service into rural areas. This approach would not be consistent with the Congressional directive of Section 309(j)(3)(A) of the Act, which makes clear that the Commission is required to promote the rapid deployment of new technologies and products to the public residing in rural America.

Finally, even if it were assumed arguendo that the newly adopted auction scheme could be applied retroactively to existing mutually exclusive applications, the Act does not authorize dismissal of these applications. Instead, Section 309(j)(1) requires as follows:

If mutually exclusive applications are accepted for filing. . . then the Commission shall have the authority, subject to paragraph 10, to grant such license or permit to a qualified applicant through the use of a system of competitive bidding that meets the requirements of this subsection.

Thus, if auction rules were to be applied to the 1992 mutually exclusive applications, the Act would require that the auction be held between those applications. Since the Commission has accepted these applications for filing by assigning file numbers, taking the

applications fees, and holding these applications for more than a year before the Commission received authority to impose competitive bidding, outright dismissal is not an option.

### **III. Auctions Are Adverse To The Public Interest.**

In assessing its MAS auction proposal, the Commission must consider the impact to the public interest objectives mandated by Congress in Section 309(j) of the Act, by applying competitive bidding rules to the awarding of MAS licenses. Before the Commission is allowed to subject mutually exclusive applications for electromagnetic spectrum to competitive bidding rules, Section 309(j) of the Act clearly requires the Commission to determine whether a system of competitive bidding will protect and promote the public interest by advancing certain statutorily defined objectives. The Commission must evaluate whether and how a system of competitive bidding will promote these objectives. The initial justification for proposing competitive bidding rules for the award of MAS licenses is generally inconsistent with the specific public interest objectives that Congress established when it enacted OBRA.

#### **A. The Commission's Justifications For Imposing The Auction Rules Are Inconsistent With Public Interest Objective Of Section 309(j)(3)(A).**

The Commission's economic policy analysis must be assessed in the context of the public interest objectives set forth by Congress in Section 309(j)(3)(A), which states that the Commission shall promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative delays." The Commission reasons that more than any other method of awarding MAS licenses for the 932/941 MHz and 928/959 MHz bands, auctions are likely to foster the "rapid deployment" of new technologies and products by placing spectrum in "the hands of those who value it most highly." NPRM at p. 51. The Commission believes that a firm that expects to be able to offer new or much lower cost services "might" be willing to pay more for a license than another firm that does not believe it can offer services as competitively.

Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2348, 2349 (released April 20, 1994). However, prior auctions have shown that this is not always the case, as several bidders have found themselves unable to construct their systems rapidly because of financial difficulties related to meeting their bid payments.

The Commission stated that because it believes that delivering MAS licenses to the highest bidder will foster the rapid deployment of MAS services, auctions will serve the goal of Section 309(j)(3)(A) to bring these new services to the public, including those living in rural areas. However, as discussed above, the Commission proposal to apply liberal construction requirements to the winner of a MAS license leaves little likelihood that rapid deployment of new technology and products will occur in rural areas. NPRM at p.39.

The Commission indicates that using auctions for awarding MAS licenses would reduce administrative burdens on the Commission, and therefore reduce the deployment time due to administrative delays. The Commission also states that a lottery would entail substantially more administrative burdens than an auction process. Specifically, Section 309(j)(3)(A) does not charge the Commission with being concerned with administrative "burdens," but rather, the statute charges the Commission with being concerned with eliminating "administrative delays." In this case, the Commission has had the applications submitted for MAS licenses since 1992. The Commission has assigned file numbers to these applications, and taken fees for the processing of the applications. The Commission has had authority to impose auction rules to the licensing of certain spectrum since the 1993 enactment of OBRA. Moreover, OBRA set forth the public interest objective of the rapid deployment of new technologies and products to the public, and in 1994 the Commission decided by rulemaking that MAS licenses would best be awarded by lottery. See §6002 of OBRA; also see Second Report and Order, 9 FCC Rcd at 2354 n.5. It is respectfully submitted that any additional time needed for a lottery is, in the big picture, a small price to pay for the fair treatment of the existing applicants, and the public interest benefit of preserving MAS as a fixed service available to small businesses. Moreover,

any licensing delay will be compensated by the shorter buildout period under the lottery scheme.

**B. Auction Rules For MAS Would Be Inconsistent With Public Interest Objective Of Section 309(j)(3)(B).**

Although the Commission recognized that certain safeguards have been necessary in the auction setting in order to prevent undue market concentration, spectrum warehousing, and to promote economic opportunity, the past measures have been resoundingly insufficient. Second Report and Order, 9 FCC Rcd at 2349. The Commission has not addressed that these mechanisms were insufficient to counterbalance the great advantages auctions conferred on the larger firms. If the design of the auction mirrors that which was implemented in the PCS auctions, then very few of these entities will receive licenses, and those that do are likely to pay an excessive amount and receive far less than the large corporate players. For example, in the PCS auctions, although there was a C block auction in which small businesses were given bidding credits, the overall effect was that these participants were forced to bid substantially greater amounts of money for substantially less coverage area, than those participants in the A and B Block auction. For the same reason, the proposed safeguards are inadequate to ensure that the entities designated by statute have equitable opportunity to participate in the competitive bidding process, and thus the Commission's proposal would undermine the public interest objective contained in Section 309(j)(3)(B) if implemented.

The Commission currently claims that, based on a review of the 50,000 applications pending for MAS licenses since 1992, it "now appears that the proposed use of some of the MAS spectrum has changed," and that the "vast majority (over 95 %)" of the applications were filed by entities planning to provide a subscriber-based service. Only two years ago, in its Second Report and Order, the Commission reached an opposite conclusion on which the Commission based its decision to exempt MAS licenses from the competitive bidding rules and reiterated that these pending applications would be subjected to lottery, just as it did in its Public Notice. At that time, the Commission explained that the decision to exempt MAS from

competitive bidding was based on the strong and unchallenged arguments that the MAS is principally used for private service. Moreover, the Commission emphasized that its own experience comported with this assessment, and thus the still pending MAS applications would be subject to lottery. Thus, in the near past, the Commission recognized that the majority of existing licensed MAS operations were not subscriber-based services. Indeed, to date, the majority of MAS operations provide internal service, yet now after failing to process the pending MAS applications for over five years and repeatedly stating that these licenses would be subject to lottery, the Commission revisits the principal use issue and reaches a completely contrary decision.

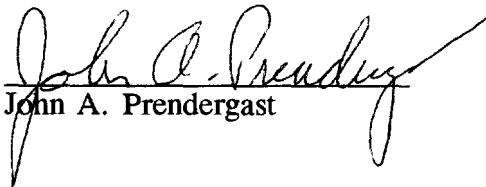
Finally, although Congress directed the Commission to promote the "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use," Congress did not make this the sole public interest concern, nor a controlling concern in the determination of whether to utilize auctions to award licenses. See Section 309(j)(3). Instead, Congress emphasized that the Commission is prohibited from basing a finding of public interest on the expectation of federal revenues from competitive bidding when making allocation decisions, such as the prescription of area designations and bandwidth assignments. See Section 309(j)(7). As such, although an auction may result in greater recovery of the value of MAS spectrum than would result from a lottery, the Commission should find that the aforementioned public interest considerations ultimately support the award of MAS licenses by lottery.

**CONCLUSION**

Wherefore, AICC respectfully requests that the Commission adopt the foregoing recommendations in WT Docket No. 97-81.

Respectfully Submitted,

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COMMITTEE**

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